

EXHIBIT C

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 SECURITIES INVESTOR PROTECTION

5 CORPORATION

6 v. CASE NO. 08-01789-smb

7 BERNARD L. MADOFF INVESTMENT

8 SECURITIES, LLC, et al,

9 Debtors.

10 - - - - - x

11 IRVING H. PICARD, TRUSTEE FOR THE

12 LIQUIDATION OF BERNARD L. MADOFF,

13 Plaintiff, ADV. PROC.

14 v CASE NO. 10-051430-smb

15 MARILYN BERNFELD TRUST, ET AL.,

16 Defendants.

17 - - - - - x

18 IRVING H. PICARD, TRUSTEE FOR THE

19 LIQUIDATION OF BERNARD L. MADOFF,

20 Plaintiff, Adv. Proceeding

21 v CASE NO. 10-05390-smb

22 1096-1100 RIVER ROAD ASSOCIATION,

23 Defendant.

24 - - - - - x

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1 - x

2 IRVING H. PICARD, TRUSTEE FOR THE

3 LIQUIDATION OF BERNARD L. MADOFF,

4 Plaintiff, **ADV. PROCEEDING**

CASE NO. 10-04283-smb

6 MENDELOW, ET AL.,

Defendants.

8 - x

9 IRVING H. PICARD, TRUSTEE FOR THE

0 LIQUIDATION OF BERNARD L. MADOFF,

11 Plaintiff, ADV. PROCEEDING

12 v CASE NO. 10-05286-smb

13 LEGACY CAPITAL, LTD., ET AL.,

14 Defendants.

15 - x

16 U.S. Bankruptcy Co

17 One Bowling Green

18 | New York, New York

19 | October 28, 2015

20 | 10:02 AM

21 | B E F O R E :

22 HON. STUART M. BERNSTEIN

23

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1 Adversary proceeding: 10-05143-smb Irving H. Picard, Trustee
2 for the Liquidation of Bernard L. Madoff Investment
3 Securities LLC, and Bernard L. Madoff v. Marilyn Bernfeld
4 Trust et al Discovery Conference Pursuant to Local
5 Bankruptcy Rule 7007-1(b) (also applies to Adv. P. Nos. 10-
6 5143 & 10-4841)

7

8 Discovery Conference Pursuant to Local Bankruptcy Rule 7007-
9 1 (b)

10

11 Adversary proceeding: 10-04283-smb Picard, as Trustee for
12 the Liquidation of Bernard v. Mendelow et al
13 Discovery Conference pursuant to Local Bankruptcy Local
14 7007-1 (b)

15

16 Defendants' Motion for Judgment on the Pleadings

17

18 Adversary proceeding: 10-05286-smb Irving H. Picard, Trustee
19 for the Liquidation of Bernard v. Legacy Capital Ltd. et al
20 Defendant Khronos Motion to Dismiss

21

22 Defendant Legacy Capital's Motion to Dismiss

23

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1 Adversary proceeding: 08-01789-smb Securities Investor
2 Protection Corporation v. Bernard L. Madoff Investment
3 Securities, LLC. et al
4 Trustees Motion and Memorandum to Affirm His Determinations
5 Denying Claims of Claimants' Holding Interests in 1973
6 Masters Vacation Fund, Bull Market Fund, and Strattham
7 Partners

8

9 Adversary proceeding: 10-04283-smb Picard, as Trustee for
10 the Liquidation of Bernard v. Mendelow et al
11 Pre-Trial Conference

12

13 Adversary proceeding: 10-05286-smb Irving H. Picard, Trustee
14 for the Liquidation of Bernard L. Madoff Investment
15 Securities LLC, and Bernard L. Madoff v. Legacy Capital Ltd.
16 et al

17 Pre-Trial Conference

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24

25

Page 5

1 A P P E A R A N C E S :

2 BAKER HOSTETLER

3 Attorneys for BLMIS, Trustee

4 45 Rockefeller Plaza

5 New York, NY 10111

6

7 BY: JONATHAN B. NEW, ESQ.

8 GEORGE KLIDONAS, ESQ.

9 OREN WARSHAVSKY, ESQ.

10 ROBERTSON D. BECKERLEGGE, ESQ.

11 AMY W. VANDERWAL, ESQ.

12 FERVE OZTURK, ESQ.

13 FARRELL A. HOCHMUTH, ESQ.

14 PETER B. SHAPIRO, ESQ.

15 TATIANA MARKEL, ESQ.

16

17 DICKSTEIN SHAPIRO, LLP

18 Attorneys for Khronos, LLC

19 1633 Broadway

20 New York, New York 10019

21

22 BY: ERIC B. FISHER, ESQ.

23 LINDSAY A. BUSH, ESQ.

24

25

Page 6

1 SECURITIES INVESTOR PROTECTION CORPORATION

2 For SiPC

3 1667 K Street, N.W.

4 Suite 1000

5 Washington, DC 20006

6

7 BY: NATHANAEL S. KELLEY, ESQ.

8

9 STEVENS & LEE, P.C.

10 Attorneys for Legacy Capital

11 485 Madison Avenue, 20th Floor

12 New York, New York 10022

13

14 BY: NICHOLAS F. KAJON, ESQ.

15

16 WEDEEN & KAVANAGH

17 Attorneys for Unspecified Party

18 41 Union Square West

19 Suite 325

20 New York, New York 10010

21

22 BY: TIMOTHY WEDEEN, ESQ.

23

24

25

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1 ARKIN SOLBAKKEN, LLP

2 Attorneys for Mendelow, et al.

3 750 Lexington Avenue

4 New York, New York 10022

5

6 BY: STANLEY S. ARKIN, ESQ.

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1 allegation in the complaint that Legacy ever made a transfer
2 to Montpellier.

3 MR. FISHER: No, there's not, Your Honor.

4 THE COURT: All right. Thank you very much.

5 MR. FISHER: Thank you.

6 THE COURT: I'll reserve decision.

7 Let's take a ten minute recess and then I'll hear
8 the argument in the other matter.

9 (Recess from 11:10 a.m. until 11:24 a.m.)

10 THE COURT: Please be seated. Next, Mendelow.

11 MR. ARKIN: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. REISEN: You want to speak first?

14 MR. ARKIN: I just want to say I'm Stanley Arkin.

15 THE COURT: How do you do?

16 MR. ARKIN: I appear for Mr. Mendelow. And my
17 colleague, Alex Reisen, who will be speaking mainly to --

18 THE COURT: Right.

19 MR. ARKIN: -- (indiscernible) here.

20 THE COURT: Okay. Go ahead.

21 MR. REISEN: Alex Reisen from Arkin Solbakken
22 representing defendants, Steven Mendelow, Nancy Mendelow,
23 Cara Mendelow, Pam Christian and C&P Associates, Ltd. and
24 Inc.

25 I'm sure we're going to talk about the actual

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1 knowledge exception. I just wanted to bring to the Court's
2 attention certain language in Ida Fishman that actually
3 raises the question about whether even an actual knowledge
4 exception still could persist. And that -- in the
5 beginning, the third and fourth paragraph of that, they
6 define the class of people that they're trying to claw back
7 from as people that profited from Madoff's Ponzi scheme,
8 whether knowingly or not. And then they define the question
9 -- they don't define the class as we all know it's -- you
10 know, good faith defendants. But -- and also, they define
11 the question as whether they can claw back, whether the
12 types of transfers are the type that are securities.

13 And then at the last paragraph, they talk about
14 Congress' balance between finality and equity and that you
15 have to respect Congress' balance. And then there's this
16 wording, cannot go past two years at all.

17 So I just want to raise that. I don't think we'll
18 have to reach it. It's an alternative --

19 THE COURT: That's in (indiscernible) with the
20 safe harbor, though.

21 MR. REISEN: Yes. And that's what we're talking
22 about, the safe harbor, the 546(e) safe harbor.

23 THE COURT: Are you saying -- are you arguing that
24 even if the defendants had actual knowledge that Madoff was
25 conducting a Ponzi scheme that the trustee can't go back

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1 more than two years?

2 MR. REISEN: I'm saying that potentially you can
3 read Ida Fishman that way. That is -- we all understand
4 that those were good faith plaintiffs, what Cohmad says. I
5 understand what can -- I understand what was just argued. I
6 just want to bring that language to the Court's attention.
7 I haven't seen it argued that way.

8 THE COURT: I thoroughly -- I'm familiar with the
9 language.

10 MR. REISEN: Fair enough. Okay. Very good. So
11 you're also quite familiar clearly with the strictness of
12 the Cohmad standard. It is at a minimum so it's not an
13 exemplar. Actual knowledge is the high degree of certainty
14 beyond high probability of known securities trades. So
15 extraordinarily high standard.

16 Then I think, really, the key message here is that
17 we are cabined in by Merkin. I think this decision really
18 could be a one-word decision. It could be Merkin, motion
19 granted. And I think the key difference between Merkin is
20 that he -- in the words that Your Honor used. He developed
21 an understanding and appreciation of what the red flags
22 could mean. That is, that indicated a potential Ponzi
23 scheme. He said this appears to be a Ponzi scheme. He was
24 aware of the impossibility of trades. He was told of the
25 possibilities.

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1 THE COURT: Is this really a red flags case? This
2 sounds like --

3 MR. REISEN: Can it --

4 THE COURT: The sense I get from the complaint is
5 it's almost an allegation of an aiding and abetting type.

6 MR. REISEN: Solely red flags. No allegations of
7 any subjective interpretation of the red flags. And, in
8 fact, to the extent that you want to say what is a
9 reasonable inference, they're sort of -- and I understand
10 that this is not in the complaint but, as Your Honor knows,
11 when you judge whether something's plausible, you use all
12 your experience and things like that.

13 We have this funny thing. We're actually
14 Preet Bharara. And Judge Swain from the southern district
15 actually say that Paul Konigsberg comes out and files in the
16 southern district of New York, someone who has all the red
17 flags that Mendelow had, guaranteed rates of return,
18 referral fees, paybacks and more. He had (indiscernible) in
19 fraudulent transaction and he personally backdated options
20 trade. Both of them come out. It's totally in an
21 unsurprised and conclusion. They don't feel the need to
22 explain themselves. That -- he had known we're at zero.
23 High degree of certainty, high probability, known suspicion
24 of a Ponzi scheme. So Mendelow was actually less than zero
25 to some extent.

1 THE COURT: So you're saying that Mendelow -- I
2 mean, Madoff got together and said let's really cook up
3 these account statements so I can make money. That's not an
4 indication that they knew that. No actual securities were
5 being traded.

6 MR. REISEN: Where is that allegation?

7 THE COURT: I'm asking you a hypothetical
8 question. I do that.

9 MR. REISEN: Of course. If they got together and
10 -- can you ask the question again?

11 THE COURT: Yeah. Mendelow and Madoff got
12 together and said let's create some fictional account
13 statements so that that will justify more payments to me.
14 That wouldn't support an inference that he knew that Madoff
15 is not engaged in the trading of securities?

16 MR. REISEN: I don't even think that would be a
17 high degree of certainty of (indiscernible). But --

18 THE COURT: I think we have a basic disagreement
19 on the state of the law. But --

20 MR. REISEN: Okay.

21 THE COURT: -- with all due respect to the U.S.
22 attorney.

23 MR. REISEN: Fair enough. Fair enough. But let's
24 talk about the one big move that they make in their motion
25 which is that they say that Mendelow personally directed --

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1 personally participated in the fraud by directing --

2 THE COURT: It's all in paragraph 94 of the
3 complaint. So why isn't paragraph 94 -- why isn't that
4 sufficient to -- and you can get a copy of the complaint.

5 MR. REISEN: Sure. That would be great.

6 THE COURT: But why isn't that a sufficient
7 allegation to support --

8 MR. REISEN: Well, what --

9 THE COURT: -- the -- let me -- please, let me
10 finish.

11 MR. REISEN: Sure. I'm sorry.

12 THE COURT: Why isn't that a sufficient allegation
13 to support the conclusion for purposes of the motion to
14 dismiss that the complaint pleads that Mendelow directed
15 BLMIS to create fictitious trades to catch up with the
16 shortfall between he was promised and what the statements
17 showed.

18 MR. REISEN: Right. So what is actually alleged
19 is three things. He calculated what he was owed in referral
20 fees, a straight percentage of what he referred from
21 Telfran; that he looked at his account balance at the end of
22 the year, or whatever, do I get my 230 grand. And if he
23 didn't, he calls him and says can you make this up. No
24 allegation (indiscernible) he did it by trading, that they
25 did it by fake trading. In fact, it's just the opposite.

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1 They allege that they did it secretly and independently.

2 The Schupt process which they did it for dozens of people
3 and it was handwritten.

4 Now let me -- if I can make --

5 THE COURT: Can I ask you a question?

6 MR. REISEN: Sure.

7 THE COURT: And it's not in the complaint but how
8 did -- how was Mendelow paid his commissions? You know,
9 through a voting clients or customers, whatever.

10 MR. REISEN: In this case, it is alleged that --

11 THE COURT: I'm asking how it really happened. In
12 other words, normally, I would think that if somebody was
13 earning a commission for referring investors --

14 MR. REISEN: Right.

15 THE COURT: -- they receive a check --

16 MR. REISEN: Right.

17 THE COURT: -- at some point.

18 MR. REISEN: Right.

19 THE COURT: The complaint seems to say that the
20 way Mendelow was compensated was that value --

21 MR. REISEN: That's exactly right.

22 THE COURT: -- was added to his account. Now I
23 suppose that that could be done legitimately by --

24 MR. REISEN: Yeah. Well, they allocate winning
25 trades.

1 THE COURT: Let me --

2 MR. REISEN: I'm sorry.

3 THE COURT: I suppose that could be done
4 legitimately by putting money into the account or putting
5 securities into the account. Is that the way he was
6 compensated, though, through his accountant?

7 MR. REISEN: Exactly right. Exactly right. So he
8 just looked at it and that's where the (indiscernible) are.
9 And you could see that he has an injunction from the SEC
10 saying do not trade securities. Do not refer securities
11 without a registered -- so -- and I think Mr. Warshavsky
12 actually said --

13 THE COURT: Isn't that an unusual way to
14 compensate somebody?

15 MR. REISEN: Is it unusual.

16 THE COURT: In other words, unless you actually
17 see somebody putting cash in -- a cash deposit were the
18 deposit of securities, how do you get compensated by -- how
19 do you get compensated? I don't understand.

20 MR. REISEN: Yes. I agree it's not maybe the
21 usual way. Does it lead to any sort of -- one single
22 factual allegation that he recognized this as unusual, that
23 he went from high degree of probability to a certainty or
24 actual knowledge that he's not trading securities. And Mr.
25 Warshavsky said he'll see something strange, the Volkswagen.

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1 You don't immediately see it's the thing but you start
2 conversing (indiscernible). If you have a strange way of
3 paying referral fees, you don't say, oh, I'm absolutely
4 certain that this is a totally implausible thing that's
5 never happened before that it's been doing for 20 years with
6 billions of dollars, no one's figured it out, that's not
7 good, it's not plausible that that's a -- the
8 non-speculative strong imprints that's pled with
9 particularity. Whereas in Merkin, you have a subjective
10 interpretation of such an unusual thing. You know, one
11 after the other. He actually talks to Bernie Madoff and
12 says what about these daily trades, the (indiscernible)
13 trades? What about the lack of self-clearing. He's told
14 that it's impossible. He has all of that stuff and even
15 Merkin does not reach the actual knowledge. So Mendelow
16 doesn't even reach Merkin. He never forms any suspicion
17 about that this is unusual. Yes, it's inquiry notice,
18 that's correct. It is an unusual way to do it.

19 THE COURT: Go ahead.

20 MR. REISEN: Okay. So the big -- and this is
21 their big move. And so, they're asking to infer from those
22 facts checks and balances, it's not enough. Give it back.
23 It's analogous to if Mendelow looks at his dry cleaning
24 bill and says, oh, you've been overcharging me 200 dollars.
25 I'm going to call up the dry cleaner and says, hey, pay me

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1 back 200 dollars; you overcharged me. Now unbeknownst to
2 Mendelow, the dry cleaner is a drug addict. She's been
3 stealing from the till and overcharging customers. She goes
4 out on the street and knifes someone to death for
5 (indiscernible) 200 dollars and pays back Mendelow. Did
6 Mendelow personally participate in the street murder by
7 personally directing him to commit street murder? Of course
8 not. But that's exactly the trustee's logic.

9 So that's the jump. So we're cabined in by
10 Merkin. We're cabined in by Konigsberg. We're less than
11 zero. And the other allegations are referral fees
12 generally. We already know that Judge Stanton says no
13 indication of fraud. And in general, you have guaranteed
14 rates of returning the same way of paying you back at the
15 end of the year. You get up to the percentage by basically
16 allocating you winners, I suppose. If it was even alleged
17 that Mendelow looked and saw that it was trades being done -
18 - he just looked at his balances, right?

19 So that -- again, if we guaranteed rates of return
20 matter, the SEC would have known when they looked at the
21 Telfran thing. They knew the guaranteed rates which were --

22 THE COURT: Well, obviously, the SEC was wrong.

23 MR. REISEN: Yes, clearly. Right. But I guess
24 the question is was it a plausible inference. And they even
25 think of it as for a second.

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1 And we have in both Prickett and in Merkin, highly
2 -- impossibly high rates and consistent rates. Still,
3 unless
4 you --

5 THE COURT: Well, I think it's a difference
6 between generally performing at an unusually high rate and
7 you guarantee those rates.

8 MR. REISEN: Yes. Well, let's talk about that. I
9 guess the idea is that, yes, if you're -- if at the end of
10 the year you're at 16 percent, I'm going to bring you up to
11 17 percent, right, by allocating you trades. It's not --
12 it's

13 a -- the plausible non-speculative imprint is not that Steve
14 Mendelow suddenly had actual knowledge that it's the thing
15 that's never happened before. And again, there's not even
16 any -- even if that was, there's no -- again, it's inquiry
17 knowledge. There's no allegation that he ever interpreted
18 this and had an understanding and appreciation, the words
19 that Your Honor used.

20 And this is the same language used in Prickett.
21 You never even get to the middle level of requisite.

22 THE COURT: Bridget?

23 MR. REISEN: Prickett. It's actually a 10(b)(5)
24 in the Madoff context. But it's the same thing in the --
25 the Court there said that you don't -- unless you interpret

1 such a red flag with a high degree to have -- be some sort
2 of subjective indication. Unless you translate it, you
3 don't even get to recklessness. It's not probative.

4 So -- and then we have the Fifth Amendment
5 imprints, which we've already looked at Judge Stanton. It
6 says you don't even need it to draw the inference. If you
7 do, it's weak. Everyone was thought to be brought into a
8 criminal vogue. In this case, I suppose if you were going
9 to think of, well, what was Mendelow thinking, he was
10 probably afraid of criminal contempt on the injunction
11 perhaps. But, again, it's not -- the trustee offered
12 nothing that could ever make such a jump. I plead the
13 Fifth. All of a sudden, he had actual knowledge that Bernie
14 Madoff never traded any securities.

15 And this is also distinguishable -- I think the
16 line that Your Honor has brought in is in the Kingate and
17 Surretti (ph) case. And the difference there is that not
18 only did they not have a subjective interpretation of Merkin
19 but now in Surretti, they actually do the comparison, figure
20 out he's doing fictitious trades, talk to each other about
21 how it's a scam and all the reasons for it. And then make
22 up stories. Try and keep other people out. Right? I mean,
23 they list all the different things. What are they going to
24 ask? What stories are they going -- you going to tell?
25 They fabricate the stories. They don't go and investigate.

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1 So -- and, of course, there's -- I mean, the
2 relationship of both Merkin, very close inner circles,
3 Surretti, Mendelow. The sole allegation of his special
4 access is he can refer clients. He can get them in contact,
5 you know, give him his phone number, type of thing. Not
6 inner circle. Not a special access type of case.

7 So that's Surretti. That's -- I believe that's
8 all of the allegations of actual knowledge.

9 And then I guess we've asked that Your Honor not
10 give them the leave to amend. I think we have delay. We
11 have futility. They're not even close. They haven't even
12 offered a possible new allegation. They've had tons of
13 discovery. They've had all of our documents for five years.
14 There's nothing that they can add.

15 THE COURT: Well, this complaint is obviously
16 drafted before these various cases came down explaining the
17 standard.

18 MR. REISEN: Yes.

19 THE COURT: Why not give him another chance to
20 plead in accordance with the standard that's now been
21 established?

22 MR. REISEN: Yes. If it wouldn't be futile, of
23 course.

24 THE COURT: Well, how do I know if --

25 MR. REISEN: If they could offer an allegation.

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1 But there isn't -- there's no facts. We know that there's
2 no facts. They have the documents. They've been doing
3 discovery that no plaintiff has ever dreamed of --

4 THE COURT: Well, maybe --

5 MR. REISEN: -- for five years.

6 THE COURT: Maybe when they drafted this
7 complaint, they thought that what they drafted was
8 sufficient and what they thought the state of the law was
9 then.

10 MR. REISEN: Oh, I think they did. I think that's
11 right. But I think the problem is that they -- you need to
12 actually propose a fact that would make it not futile,
13 right? They had represented to this Court even after Ida
14 Fishman that they're not thinking of amending. Now if they
15 thought

16 actual -- remember, back in when Katz was decided, if they
17 knew this was an actual knowledge case, they could have just
18 gone ahead. Why did they give us four years of extensions
19 if Katz wasn't going to matter, if they were pleading actual
20 knowledge anyway? They could have just gone ahead. We're
21 going to be prejudiced. We thought we were going to have to
22 do objective notice which is essentially the only reason a
23 person would have done. Now all of a sudden, we've got to
24 go back five years. How are we going to prove subjective
25 state of mind. Totally different set of evidence. We are

1 prejudiced.

2 THE COURT: Why didn't you move to dismiss the
3 complaint four years ago?

4 MR. REISEN: Well, because -- that's a great
5 question. Because we didn't want to waste the resources.
6 What if Katz and Ida Fishman goes the other way? It's
7 useless. The whole point is -- our whole understanding was
8 that we're waiting to see -- of course, you're not --

9 THE COURT: Well, can't you make the same argument
10 as to why they didn't amend the complaint? If you're
11 waiting before you make the motion to dismiss, why isn't it
12 fair for them to wait in order to make a decision to amend
13 the complaint? For instance, the court of appeals could
14 have said (indiscernible) notice was enough.

15 MR. REISEN: Well, they -- yes. They thought that
16 they were going under actual -- they're claiming to believe
17 that they've always had actual knowledge. If they had
18 actual knowledge, they could have gone ahead and -- anyway,
19 there would have been no reason to wait if they thought they
20 had actual knowledge.

21 Now -- and either way, the point is that it's
22 their burden to plead. It's not our burden to inform or
23 move to dismiss when it's going to be a waste of time.

24 THE COURT: So why not let them re-plead and see
25 if they can re-plead the complaint?

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1 MR. REISEN: Well, because we're prejudiced.

2 Because --

3 THE COURT: How are you prejudiced?

4 MR. REISEN: Because we're not -- mostly because
5 of the time that we've been forced -- we won't be able to go
6 and get subjective evidence.

7 THE COURT: What do you mean?

8 MR. REISEN: Evidence as -- it's a totally
9 different set of evidence that -- we're on notice five years
10 ago that their complaint is -- they never even claimed
11 (indiscernible) any subjective notice at all. There's no
12 facts at all. We've never been -- so we're waiting -- we're
13 trying to get evidence on, I guess, object of notice. All
14 of a sudden, five years down the line, we've got -- oh, it's
15 a totally different thing.

16 THE COURT: But you knew that was the standard at
17 the test. Didn't you start to gather that evidence?

18 MR. REISEN: We're not on notice that there's any
19 possibility that we could ever even face a claim. There's
20 not even a conclusory statement of anything like actual
21 knowledge --

22 THE COURT: So what kind of evidence would you
23 have to gather?

24 MR. REISEN: -- let alone facts.

25 THE COURT: What kind of evidence would you have

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1 gathered that you can no longer gather?

2 MR. REISEN: Well, I suppose everyone's testimony,
3 everyone's memory, what did Steve tell you, what was his
4 thoughts, subjective thoughts about this. His memory fades.
5 People -- I mean, for example, DiPasceli is now dead, right?
6 We want to ask, well, were there any conversations that
7 Mendelow --

8 THE COURT: Did he have any conversations with --

9 MR. REISEN: I think --

10 THE COURT: -- DiPasceli?

11 MR. REISEN: I don't believe so but --

12 THE COURT: So --

13 MR. REISEN: But we could ask DiPasceli did you
14 ever have any conversations with Mendelow, right?

15 THE COURT: Well, Mendelow will say I didn't and
16 they won't be able to say anything else, will they?

17 MR. REISEN: Well, I suppose that's right. But
18 the bottom line, I guess, is that they've had so much
19 evidence. They've made this motion that we believe is
20 actually -- there's no basis for. We've had to defend
21 against it. They claim that they're not going to amend it.
22 They don't even have a basis to amend. They still don't
23 even propose in their complaint what they could possibly
24 add. So how can we even argue futility. And the case law
25 actually says that you can infer that it's going to be

1 futile.

2 And again, we're not even close. We're way down
3 below zero. They've got to get up to 99. They've got to
4 pass Konigsberg and Merkin, all the way up. What are they
5 going to allege? There's nothing -- there's no facts --

6 THE COURT: Let's find out.

7 MR. REISEN: Very good. Very good. Thank you.

8 MR. ARKIN: You want to mention Konigsberg?

9 MR. REISEN: I think we did speak about
10 Konigsberg, is that correct? Konigsberg and Preet Bharara
11 and about how he had more red flags and still be --

12 THE COURT: Well, but that's what the U.S.
13 attorney says.

14 MR. REISEN: Fair enough. Fair enough.

15 THE COURT: Okay.

16 MR. REISEN: It just goes --

17 THE COURT: We may disagree on that.

18 MR. REISEN: Fair enough.

19 MR. ARKIN: Why do you say, Your Honor --

20 THE COURT: Sure. Speak into the microphone,
21 please.

22 MR. ARKIN: I'm sorry. I should be closer. I
23 just want to say Preet is the U.S. attorney.

24 THE COURT: Yes. I understand --

25 MR. ARKIN: A responsible public official for law

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1 enforcement, a man who had a number of these cases passed
2 through its office. He comes out and he says what he says.
3 And in the period of time we've had this case in our office,
4 five years, six years, there's been nothing coming from them
5 remotely suggesting actual knowledge on the part of our
6 clogged (indiscernible). He was getting commissions for
7 clients or investors he -- starting in 1993 he recommended
8 to the company, New York (indiscernible). There was
9 nothing, six years, which has emerged which shows what
10 Merkin and Konigsberg demonstrate actual knowledge is on the
11 part of Mr. Mendelow. Just nothing.

12 THE COURT: Thank you.

13 MR. NEW: Good morning, Your Honor. Jonathan New
14 from Baker Hostetler for the trustee. With me at counsel
15 table this morning is Robertson Beckerlegge also of Baker
16 Hostetler.

17 THE COURT: How do you do?

18 MR. NEW: Your Honor, as I think the standard has
19 been clearly set out here. The standard to overcome the
20 546(e) safe harbor is the complaint has to plausibly allege
21 facts suggesting that the defendants had actual knowledge
22 that there were no legitimate securities transactions
23 occurring in the accounts. And while I am prepared to
24 discuss, Your Honor, I think there are several different
25 facts in this complaint that support that allegation going

1 all the way back to his relationship with Telfran and the
2 SEC action through the guaranteed rates of return.

3 THE COURT: Yeah. I read all that. And I read
4 the Avellino again in his motion. I don't know what that
5 has to do with actual knowledge there were no securities
6 being traded.

7 MR. NEW: Your Honor, I think it's context. And
8 it goes to what their state of mind was at the time that
9 they did enter into the transactions that Your Honor
10 (indiscernible) which is what is the key fact here, which is
11 what's alleged in paragraphs 94 through 96 of the complaint.

12 THE COURT: See, the way I read paragraph 94,
13 Mendelow says there's a shortfall. You owe me money. Make
14 it up. That's all that paragraph 24 (sic) alleges. And
15 then -- 94. And then it goes on to allege in the last
16 sentence that the way BLMIS did it is it created fictitious
17 trades in the accounts. But unlike some of the other cases
18 we've seen where -- and I'll use Cohmad as an example that
19 the defendant

20 Jaffe -- he actually participated in directing the creation
21 of fictitious and backdated trades. That's not -- I don't
22 read 94 to allege that. Can you allege in words or
23 substance that Mendelow actually got together with
24 representatives of BLMIS, whether it's Madoff or somebody
25 else, and said, you know what, I want you to create these

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1 fictitious trades as a way to compensate me? Can you make
2 that allegation?

3 MR. NEW: Well, Your Honor, what we do allege --
4 and then --

5 THE COURT: I guess the answer is no.

6 MR. NEW: No. Your Honor, I think we can in the
7 sense that I think it's here. And I'm stuck to what's in
8 the complaint.

9 THE COURT: I don't agree that it is. I just
10 don't see it.

11 MR. NEW: Your Honor, may I proceed?

12 THE COURT: Go ahead.

13 MR. NEW: I think first you have to understand
14 what is the nature of these -- what we call fraudulent side
15 payments but they were co-worker (indiscernible) --

16 THE COURT: They're -- you can call them
17 fraudulent side payments. And that's --

18 MR. NEW: But I think, Your Honor --

19 THE COURT: -- you know, that's an inflammatory
20 phrase. I didn't -- it looks like they're commissions.

21 MR. NEW: Your Honor, if you prefer to call them
22 commissions --

23 THE COURT: Well --

24 MR. NEW: -- you can call them commissions but --

25 THE COURT: If you want to call it fraudulent side

1 payments --

2 MR. NEW: But --

3 THE COURT: -- go ahead.

4 MR. NEW: But the key issue is the nature of them.

5 And I think Your Honor had this colloquy with Mr. Reisen as
6 to exactly how they occurred every year, every December, in
7 the accounts that he was monitoring. And so, from the very
8 beginning when he first started receiving these commissions,
9 if you'd like to call them that, they weren't payments.
10 They weren't checks. They weren't cash. They weren't
11 securities deposited into the accounts. They weren't, as
12 Mr. Reisen seems to suggest, some allocation of winning
13 transactions from someplace else in BLMIS.

14 What were they? They were trades in these
15 accounts based upon the principal supposedly in those
16 accounts that yielded the magic pre-determined amount every
17 single time. And it was done through these options
18 transactions. The allegations here are that Mr. Mendelow
19 knew that he was receiving them, that he tracked his
20 accounts, he monitored whether he received it, he was
21 looking at his accounts. He would not have seen any other
22 way he was receiving these fees other than through such
23 fictitious transactions.

24 So with that as background, when you get to the
25 point that he tracks and monitors those accounts, does a

1 calculation which is based upon his understanding of a 17
2 percent guaranteed return and also the amounts of these
3 transactions. And he says that should have been my return,
4 my yield on my account. And then he compares that to what
5 he actually got as returns on the account. And then he says
6 no, you need to make it up to me. There's no other way that
7 that could have been made up to him given his knowledge of
8 what's been going on in these accounts other than through
9 these fictitious transactions.

10 THE COURT: Well, but, you know, your brief in
11 several places says that Mendelow directed BLMIS and Madoff
12 to do this. He may have acquiesced to it but I don't see
13 where he directed --

14 MR. NEW: Your Honor --

15 THE COURT: -- Madoff to do certain things other
16 than make up the shortfall.

17 MR. NEW: Your Honor, that's a straight quote
18 practically from paragraph 96 which says "The fact that
19 Mendelow was able to direct the value of his accounts at
20 BLMIS based upon his own calculations and to ensure he
21 received specific amounts through fictitious options
22 transactions is indicative of his knowledge of fraudulent
23 trading activity."

24 THE COURT: I don't read 94 as directing the value
25 in his accounts. Again, it's just saying you owe me money,

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1 make up the shortfall. And then it says the way BLMIS did
2 it is it added these fictitious trades to the account to
3 generate the "profits" necessary to make up the difference.

4 MR. NEW: Well, Your Honor, in ways --

5 THE COURT: That's really what is alleged.

6 MR. NEW: Well, I think it alleges that but there
7 is -- if it's not explicit, and I think it is more explicit
8 than that, but there is the inference of how was that done
9 because if he's looking at his accounts before, as we say
10 he's closely monitoring them, and he sees that the only way
11 he's getting these gains is through securities transactions
12 and then he says make it up to me, and it's corrected, and
13 he looks back at his accounts and he sees there's no inflows
14 of money, there's no inflows of securities. (Indiscernible)
15 fictitious options transactions.

16 THE COURT: Okay. But there were options
17 transactions listed in the statements which generated the
18 profits, right -- the shortfall?

19 MR. NEW: Correct. The exact amounts of profits.

20 THE COURT: So why isn't it plausible for him to
21 assume that Madoff gave to these transactions, allocated
22 them and that's how he made up the difference?

23 MR. NEW: Well, Your Honor, I think there's
24 several reasons why that's not plausible. I think, first of
25 all, the fact that he's engaging in speculative options

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1 transactions over a number of years that always hits on a
2 pre-determined amount is not plausible.

3 Second, he has various accounts that he's
4 monitoring. Some of these accounts, for his daughters, for
5 example, do not receive these fictitious options
6 transactions. All these accounts are supposedly engaging in
7 the same strategy. If Madoff is able to invest his funds in
8 such a way to get a return of 20 percent or more in his
9 accounts, why isn't he doing that in all the accounts? It's
10 not plausible to imagine that a broker could go out in the
11 securities market and always, in the same month, in every
12 year engage in securities transactions that only -- that
13 always yield the pre-determined amounts.

14 THE COURT: Actually, you just raised an issue
15 about the other accounts. Don't -- doesn't the liability of
16 some of those account holders depend on the imputation of
17 Mendelow's knowledge?

18 MR. NEW: That's correct, Your Honor.

19 THE COURT: All right. I understand
20 (indiscernible) C&P. But as to the other transferees, where
21 are the allegations it's (indiscernible) imputation?

22 MR. NEW: Your Honor, the other allegations with
23 regard to (indiscernible) C&P are that, effectively, that
24 Mr. Mendelow acted as their agent.

25 THE COURT: That's a conclusion. What are the --

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1 MR. NEW: Yes, Your Honor. The only allegation in
2 the complaint -- and again, you know, we pled this at a
3 time, Your Honor, when we did not believe we had factual
4 knowledge for all the defendants.

5 THE COURT: Do you want to re-plead your
6 complaint?

7 MR. NEW: Well, Your Honor, we think it's
8 sufficient.

9 THE COURT: All right.

10 MR. NEW: But if it's not, we were going to ask
11 for leave to re-plead.

12 I would point, Your Honor, to paragraph 6 of the
13 complaint which says that all the BLMIS accounts basically
14 were managed and overseen by Mr. Mendelow.

15 THE COURT: That's -- that just sounds like a
16 conclusion to me.

17 MR. NEW: It may be, Your Honor. It --

18 THE COURT: I've had other cases where, for
19 example, the principal or the agent is getting all the
20 account statements and reviewing all the account statements
21 and giving directions relating to all the account
22 statements. And that's not in this complaint.

23 MR. NEW: It's not, Your Honor, quite frankly,
24 because we didn't, at the time, believe we needed to plead
25 that. If we do need to plead that, Your Honor, we can re-

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1 plead and include allegations --

2 THE COURT: But don't think you have to plead
3 that? I mean, this -- the entire complaint is sprinkled
4 with knew or should have known and know or should know, but
5 that's not the standard. At least for now.

6 MR. NEW: That's correct, Your Honor.

7 THE COURT: All right.

8 MR. NEW: Although it does say "knew" so there is
9 --

10 THE COURT: Well --

11 MR. NEW: -- an alternative. It is an
12 alternative argument.

13 THE COURT: But then again, that's a conclusion
14 that something knew something. You'd have to allege facts.

15 MR. NEW: Yes, Your Honor. And I believe, as we
16 are -- we've been discussing the facts there are to support
17 that knowledge.

18 The one thing we haven't touched on, Your Honor,
19 is the guaranteed rates of return which, similarly, the
20 allegations in the complaint are that he knew he was going
21 to be receiving a guaranteed return on his accounts of at
22 least 17 percent. He obviously knew before that in Telfran
23 that he was getting a guaranteed return from Madoff as well.
24 And when you're dealing with securities transactions in the
25 market, it is just implausible for anyone to believe that

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1 you can get a guaranteed return. And that's what he was
2 guaranteed here. And not only did he know that, he was
3 tracking it. So it wasn't that he was hopeful that he would
4 get it or that he was monitoring. He expected to get it.
5 And when he didn't get it, that was part of what he asked
6 them to correct.

7 So again, that goes to the fact that he had actual
8 knowledge that they were not securities transactions that
9 were occurring in his account. And I think it also goes
10 without saying, Your Honor, although it's not an independent
11 basis to conclude this that when Mr. Mendelow was deposed on
12 these issues, he was specifically asked about the fraudulent
13 side payments and the guaranteed rates of return and other
14 things, he did invoke his Fifth Amendment rights and refused
15 to answer.

16 THE COURT: All he's told me is that he invoked
17 the Fifth Amendment right. So I don't know what he was
18 asked as to which he invoked his Fifth Amendment privilege.

19 MR. NEW: Well, there is an allegation, and it is
20 general, Your Honor, that he was asked questions
21 specifically about fraudulent side payments and about the
22 guaranteed returns and about Avellino and Bienes and he
23 refused to answer those questions.

24 Again, Your Honor, this complaint --

25 THE COURT: I don't know what it says. Anybody

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1 who was being deposed or questioned by the U.S. attorney or
2 the SEC at the time might very well have invoked the Fifth
3 Amendment privilege even though it had -- they had no
4 participation or level of participation that's needed to
5 support an inference of actual knowledge.

6 MR. NEW: Your Honor, again, it's a permissible
7 inference; it's not a mandatory inference. We would suggest
8 that that is not by itself enough, but given the other facts
9 that we have alleged that show actual knowledge, that
10 factually it's the fraudulent side payments, the facts
11 allege the guaranteed rates of return, that given that, his
12 refusal to answer is sufficient to add to that inference
13 that we've pled enough to meet the actual knowledge
14 standard.

15 And with regard to leave to re-plead, Your Honor,
16 obviously, we believe that the complaint is sufficient. If
17 it's not, we would ask for leave to re-plead. Some of the
18 issues that we've discussed this morning, Your Honor, are
19 things that could be addressed if necessary in an amended
20 complaint. And --

21 THE COURT: So why don't you just re-plead the
22 complaint if you think you can make those allegations?

23 MR. NEW: Your Honor, quite honestly, we think
24 that it's sufficient and it would be a waste of not only
25 judicial resources but our own resources --

1 THE COURT: Got it.

2 MR. NEW: -- to file an amended complaint and go
3 through another briefing schedule if this complaint is
4 sufficient.

5 Also, Your Honor, at this time, we don't have the
6 ability to amend as of right. Given the way that the
7 defendants have proceeded in this case, we would need to
8 seek leave of Court to amend.

9 THE COURT: So why don't you make a motion for
10 leave to amend and attach your proposed complaint. And
11 they'll argue it's few words not (indiscernible) and deal
12 with it that way.

13 MR. NEW: Again, Your Honor, we could do that but
14 it would be a waste -- we think it would be a waste of
15 resources.

16 THE COURT: Well, I think it's -- I'm not
17 convinced that this is a sufficient complaint. And I think
18 it's a waste of resources to have to go through this
19 exercise to then grant you leave to amend and then go
20 through the exercise a second time. But all right.

21 Certainly, there are valid claims, I think, under
22 the first claim which is just a fictitious profits claim
23 (indiscernible). I wouldn't dismiss that claim.

24 MR. NEW: Yes, Your Honor. Well, we believe it's
25 sufficient on all the counts.

1 THE COURT: All right. I got it.

2 MR. NEW: If Your Honor is inclined, we would seek
3 to make a motion for leave to amend.

4 THE COURT: I just think it'll save a lot of time.
5 If you think that you can make -- if you can allege that he
6 actually knew or maybe he willfully blinded himself, because
7 that's another distinction that has arisen over the last
8 four years, that you should allege it. But this complaint
9 replete with knew or should have known. It was just -- and
10 I understand why it was done. It was done when everybody
11 thought that's what the state of the law was.

12 All I'm suggesting is when I review this, I'm
13 probably going to conclude that except for the first claim
14 for relief, it probably is insufficient the way it's pleaded
15 under the old standard. And it'll expedite things if you
16 just make a motion for leave to amend and attach the
17 complaint that it meets the pleading standards
18 (indiscernible).

19 MR. NEW: Your Honor, we will definitely do that.
20 Should we -- do we need to, at this time, address a briefing
21 schedule on that or should we discuss it with the parties?

22 THE COURT: I think you should just -- well, you
23 can discuss it with your colleague but I just think that's
24 the best way to handle this. And if you can really plead
25 it, then you can plead it and we'll deal with that complaint

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1 'cause most of the complaints I've seen have been amended to
2 comply with the pleading requirements that have been
3 enunciated in the various cases. This one wasn't for some
4 reason. And I understand that the defendant didn't answer
5 until November 2014, I think. And they said they didn't
6 want to waste my time. But, you know, at the same token, I
7 understand you don't want to waste the time. But just
8 judging from what's pleaded here, I think it would make
9 sense to seek leave to re-plead. But you don't have to. I
10 will decide this.

11 MR. NEW: Your Honor, I think we will be seeking
12 leave to re-plead.

13 THE COURT: Can we leave it at that? You'll make
14 a motion, you'll attach an amended complaint, and you can
15 argue that you're prejudiced or it's futile or there's been
16 an undue delay although for the reasons I've discussed,
17 you've already told me you wanted to wait. So, you know, I
18 suppose they're entitled to wait.

19 MR. NEW: We can make that argument in the
20 briefing but, yes, that's fine.

21 THE COURT: 'Cause you haven't convinced me about
22 prejudice. You may have to put in --

23 MR. NEW: Fair enough.

24 THE COURT: -- some affidavit explaining
25 somebody's died or some evidence has been destroyed and you

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1 can't defend the action for that reason.

2 MR. NEW: Okay.

3 THE COURT: And if I deny the motion for leave to
4 re-plead then maybe I'll decide this motion. All right.

5 Does that make sense?

6 MR. ARKIN: Makes sense.

7 THE COURT: Okay. So I will hold this one in
8 abeyance and I look forward to your motion.

9 MR. ARKIN: Only one thing --

10 MR. NEW: Thank you, Your Honor.

11 MR. ARKIN: -- Your Honor.

12 THE COURT: Yes, sir?

13 MR. ARKIN: Somebody used the word "imagine".

14 THE COURT: Pardon?

15 MR. ARKIN: Somebody used the word "imagine" just
16 a few moments ago. I think Mr. New. No imaginary
17 allegations.

18 THE COURT: Well, we can't sensor what they plead
19 beforehand. Only after, I guess. So we'll see what they
20 say.

21 MR. NEW: Your Honor, we --

22 MR. ARKIN: It's a prayerful admonition.

23 MR. NEW: Your Honor, we are mindful --

24 THE COURT: I join in that. These complaints are
25 very long.

1 MR. NEW: Your Honor, we're mindful of Rule 11
2 and, obviously, we're not going to make any imaginary
3 allegations.

4 THE COURT: No. No. I -- okay. Thank you very
5 much.

6 MR. NEW: Your Honor, there is also a discovery
7 issue --

8 THE COURT: Yes.

9 MR. NEW: -- in this.

10 THE COURT: Let me just mark -- make a note of
11 that that's --

12 MR. ARKIN: Good morning, Your Honor.

13 THE COURT: Thank you very much.

14 MR. ARKIN: Thank you very much.

15 THE COURT: You're excused. You're welcome to
16 stay but you're excused.

17 MR. NEW: Your Honor, the discovery dispute
18 includes that as well.

19 THE COURT: Oh, okay. Yeah. Why don't we take
20 yours -- well, it's really tied up -- and I understand that
21 they didn't understand or maybe they should move for a
22 protective order. I didn't see the -- did you file an
23 objection?

24 MR. REISEN: We didn't -- oh, sure. We objected.
25 And then we want to move for a stay if we needed to. But I

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1 think the hope is that we will just wait and see whether
2 they --

3 THE COURT: Doesn't the objection -- don't you
4 have to do something if they object to the document request
5 like make a motion compel discovery?

6 MR. NEW: Well, Your Honor, that's what we
7 actually noted -- notified the Court --

8 THE COURT: Yeah.

9 MR. NEW: -- that it was a pre-motion conference
10 and a motion to compel.

11 THE COURT: Doesn't it make sense to see if the
12 complaint survives in this case?

13 MR. NEW: Your Honor, the complaint is going to
14 survive, as you said, at least with respect to one count.
15 They --

16 THE COURT: So you want to take discovery on that
17 one count?

18 MR. NEW: Well, Your Honor, I think --

19 THE COURT: It's almost a strict liability count.

20 MR. NEW: Well, Your Honor, they're refusing to
21 provide any discovery at all.

22 THE COURT: Right. Well, you --

23 MR. NEW: They refuse to answer any of the
24 interrogatories. And with regard to the documents that
25 they've previously produced, they won't stipulate to the

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1 fact that they can be used in this case. So we don't have
2 any documents other than eight pages of documents that
3 they've produced. And no interrogatory responses at all.

4 THE COURT: But at the --

5 MR. REISEN: Your Honor --

6 THE COURT: -- end of the day, the only case may
7 be the case that's alleged in Count I.

8 MR. REISEN: We've given all discovery on Count I.
9 In fact, we produced it all. That shows all of the two-year
10 transfers. We'll wait completely. And we're willing to do
11 that. We can --

12 THE COURT: My suggestion is that rather than get
13 involved in discovery before we know whether we have a
14 sufficient -- legally sufficient complaint that we determine
15 that first.

16 MR. NEW: Your Honor --

17 THE COURT: And you're right. You can take
18 discovery on the first claim and then if, as you -- when you
19 seek more discovery, they're going to say, hey, wait a
20 minute. You know, this is becoming -- they're onerous --
21 you're seeking discovery in stages.

22 MR. NEW: Your Honor, I would simply ask that they
23 actually comply with the local rule and respond to the
24 interrogatory requests that were sent to them. They gave no
25 responses to any of the interrogatory requests.

1 THE COURT: Oh, you didn't object?

2 MR. REISEN: Oh, we did. Sure. We objected --

3 THE COURT: In the interrogatory responses?

4 MR. REISEN: Yes.

5 MR. NEW: It was a general objection, Your Honor.

6 MR. REISEN: We're happy to give all objections if
7 they want. We just think that that would be extra work.

8 THE COURT: Well --

9 MR. REISEN: And we may actually move for a stay.
10 But we're perfectly willing to give discovery on
11 (indiscernible). We already have.

12 THE COURT: My concern is if you're taking
13 discovery before you have a legally sufficient claim and
14 might argue we use that discovery to bolster the allegations
15 which is exactly what you're not supposed to do.

16 MR. NEW: Except, Your Honor, the only thing I
17 would point out is if this case does not arrive -- what's
18 present before Your Honor is not a motion to dismiss.
19 What's present before Your Honor is a motion for judgment on
20 the pleadings. There is a case management order in place in
21 which they agreed to proceed on discovery. We would have
22 had -- if they had not been obstructionists, we would have
23 actually had the benefit of that discovery to use going
24 forward.

25 This -- and even in a motion to dismiss, Your

1 Honor, the state of the law is generally a stay is not
2 appropriate. And there needs to be good cause for a stay.
3 In this case, we don't think that they've established good
4 cause. And they haven't even moved for a stay, Your Honor.
5 And they have entered into a case management order in which
6 they agreed to proceed with discovery.

7 MR. REISEN: If I could, Your Honor, as I
8 understand that we're contemplating dismissing everything
9 but Count I in the -- and we're having --

10 THE COURT: Well --

11 MR. REISEN: -- to give discovery on the one count
12 that's legally sufficient. And then if they get to plead,
13 of course give discovery on that as well.

14 THE COURT: Well, but he's saying, look, you know,
15 it's a case management order. The motion itself doesn't
16 stay discovery. And you were required to give discovery a
17 long time ago and you never did it.

18 MR. REISEN: Well, for what it's worth, actually,
19 we've given them essentially everything five years ago. But
20 -- in the 2004. But for what it's worth, it's my
21 understanding that, yes, we will give full discovery on
22 everything that's still a valid pleading on file which will
23 be just that one --

24 THE COURT: But there is a valid pleading on file.

25 MR. REISEN: That's right. Count I.

1 THE COURT: Well, no. There's a valid pleading.
2 And all I suggested was, if you want, I'll decide this
3 pleading and then I'll grant the leave to re-plead. If I
4 dismiss it, all I'm suggesting is to cut through that
5 because I do have questions about the sufficiency of the
6 pleading and have them make a motion to re-plead and then
7 you can make your futility and delay and prejudice
8 arguments.

9 MR. REISEN: Yeah. So -- but at that point, the
10 only -- you will have dismissed --

11 THE COURT: I'm not dismissing their complaint.

12 MR. REISEN: Fair enough. Well, I guess the idea
13 would be that you would dismiss all but Count I and then you
14 would see whether they have a right to re-plead and at that
15 point, we'll give full discovery on the one count that's
16 remaining. And then if you give them lead to re-plead,
17 we'll, of course, give discovery on that as well.

18 THE COURT: Look, I'm going to hold the discovery
19 in abeyance. Let's just see if you have a valid complaint
20 or if it's just a claim for fictitious profits which is a
21 much different claim from the type of claim you're trying to
22 plead.

23 MR. NEW: Yes, it is, Your Honor. Thank you, Your
24 Honor.

25 MR. REISEN: Thank you, Your Honor.